

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CENTER CONSTRUCTION COMPANY, INC.
d/b/a CENTER SERVICE SYSTEM DIVISION

and

Cases 7-CA-46490
7-CA-46696
7-CA-46697

LOCAL 370, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY
OF THE UNITED STATES AND CANADA, AFL-CIO

ORDER¹

The Charging Party's Request for Review of the General Counsel's decision sustaining the Regional Director's compliance determination is granted, and the case is remanded to the Regional Director for appropriate action, as described below. The Charging Party contends that the General Counsel erred by adopting the Regional Director's conclusion that the Respondent's backpay liability ended on September 2, 2005, the date that the Respondent contends it no longer had substantially equivalent plumbing positions available to offer the discriminatees, and by apparently concluding that the Respondent

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

was no longer required to recognize and bargain with the Union. Specifically, the Charging Party argues that the Regional Director ignored the evidence of plumbing permits obtained by the Respondent and bids for plumbing work that postdate September 2, 2005. In addition, the Charging Party maintains that the Regional Director erred by crediting the Respondent's claim that sheet metal workers employed by the Respondent, rather than the Respondent's plumbing employees, had previously performed plumbing service work, without directly questioning discriminatee Wayne Rose concerning his performance of plumbing service work for the Respondent. The Charging Party contends that the Regional Director's determination will allow the Respondent to "escape the imposition of any meaningful remedy for its widespread unfair labor practices" and to evade the court-enforced bargaining order.²

We find that the Regional Director's compliance determination does not indicate what evidence, if any, he relied on in concluding that the Respondent's backpay liability ended on September 2, 2005. We also find that the Regional Director, and subsequently the General Counsel, improperly placed the burden on the Charging Party to demonstrate that the Respondent

² *Center Service System Division*, 345 NLRB 729 (2005), *enfd.* 482 F.3d 425 (6th Cir. 2007).

has continued to perform plumbing work.³ The Regional Director's compliance determination indicates that the Regional Director improperly shifted the burden to the Charging Party to provide evidence to contradict the Respondent's assertions and to demonstrate that the backpay period continued past September 2, 2005.⁴

³ The Board's Casehandling Manual Part III (Compliance) states:

Respondent may contend that a discriminatee is no longer suitable for a job for such reasons as . . . change of job content, and that reinstatement should be precluded.

In such situations, the Compliance Officer should investigate the nature of the changed circumstances and the established employer policies, and should seek to determine what would have happened to the employee in the absence of any unlawful action. **The respondent bears the burden of showing that reinstatement is not appropriate under the circumstances presented. This burden cannot be met with speculation or statements that are not factually supported.** CHM 10532.3, emphasis added (citing *Contemporary Guidance Services*, 300 NLRB 556, 558-560 (1990)).

⁴ The Regional Director's compliance determination letter states as follows:

The Charging Union furnished no contrary evidence [to the Respondent's statement that permits were obtained for work performed on homes of relatives or members of management and work was performed solely by managers and/or supervisors] or that Respondent has hired employees to perform such plumbing work. The Charging Union also contends that Respondent currently is performing plumbing work, but has failed to establish that the purported plumbing work is something other than the work traditionally performed by members of the existing Sheet Metal Workers bargaining unit. The

In addition, the Regional Director's compliance determination did not address the evidence proffered by the Charging Party regarding its claim that the Respondent continued to perform plumbing service work. As to the Respondent's claim that sheet metal workers performed plumbing service work, it appears that the Regional Director did not directly question Rose about whether he performed plumbing service work during his employment with the Respondent.

On remand, the Regional Director may provide an amended compliance specification containing an explanation of the evidence he relied on to support the Respondent's assertions. If such evidence was not found during the compliance investigation, the disputed facts concerning the existence of plumbing positions or substantially equivalent positions warrant further investigation, and possibly a compliance hearing. Accordingly, we remand this case to the Regional Director for Region 7 for further explanation or to conduct further investigation and, if the Respondent cannot meet its burden of establishing facts sufficient to warrant tolling the backpay

Charging Union provided no evidence that these assignments are outside the scope of the work historically performed by those employees or that the work was performed by employees other than those in the existing Sheet Metal Workers bargaining unit, or managers and/or supervisors of Respondent.

period, to schedule a compliance hearing before an administrative law judge.

Dated, Washington, D.C., September 3, 2008.

PETER C. SCHAUUMBER, CHAIRMAN

WILMA B. LIEBMAN, MEMBER